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IN THE
COURT OF APPEALS OF INDIANA

DONALD H. SCHOTT, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0608-PC-391
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Gene Duffin, Judge
Cause No. 20C01-9601-CF-004

February 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Donald H. Schott, Jr. appeals his forty-year sentence for involuntary manslaughter. He alleges that the trial court improperly found one aggravating circumstance and improperly balanced valid aggravators and mitigators. Finding no error in the court's handling of the aggravators and mitigators, we affirm.

Facts and Procedural History

On January 28, 1996, Schott, then nineteen years old, was living with his mother and his step-father, Clarence Peffley. Schott and Peffley had a history of problems dating back to Peffley's marriage to Schott's mother when Schott was only ten or eleven years old. On this date, the two men got into an argument that escalated into a violent physical confrontation. Schott left the home with some of his belongings and went to his biological father's home. He subsequently reported the incident to the Elkhart Police Department.

Later that night, Schott returned to his mother's home and was discussing the confrontation with her when he was approached again by Peffley. Schott was carrying a fully-loaded nine millimeter handgun, and he proceeded to shoot Peffley in the residence. Schott continued shooting the weapon until the gun ran out of bullets. He then ran away from the crime scene. Peffley died as a result of the gunshot wounds inflicted by Schott.

The next day, a warrant was issued for Schott's arrest, and he turned himself in to the police. Schott was initially charged with one count of Murder.[1] During the police investigation of the crime, Schott lead police to the gun used in the shooting, but he never

[1] Ind. Code § 35-42-1-1.

admitted to shooting Peffley. However, the charging information was amended on May 23, 1996, to add a count of Voluntary Manslaughter as a Class A Felony.[2] Schott pled guilty to this charge in exchange for the dismissal of the murder charge. The plea bargain left sentencing to the trial court.

A sentencing hearing was held on July 25, 1996, and Schott was sentenced to forty years incarceration. The trial court's sentencing order provided, in pertinent part:

> The Court finds as mitigating circumstances the Defendant's age; and the fact that the Defendant had no prior offenses as a juvenile or as an adult. The Court finds as aggravating circumstances the manner in which the weapon was used and that the Defendant returned to a scene of prior violence armed. The Court finds that the aggravating circumstances outweigh the mitigating circumstances; hence the enhanced sentence.

Appellant's App. p. 29-30. Schott did not directly appeal his case; however, on May 23, 2006, he filed a Petition for Permission to File a Belated Notice of Appeal, which was granted on the same date. This appeal now ensues.

Discussion and Decision

On appeal, Schott argues that the trial court abused its discretion when it sentenced him to forty years in prison.[3] He contends that the trial court "may have considered an

[2] Ind. Code § 35-42-1-3.

[3] Schott committed his crime on January 28, 1996, and he was sentenced on July 25, 1996. Since that time, Indiana Code § 35-50-2-4 has been amended to provide for "advisory" sentencing rather than "presumptive" sentencing. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005) (changing sections of Indiana Code to reflect advisory sentencing). This Court has previously held that the change from presumptive to advisory sentences should not be applied retroactively. *See Walsman v. State*, 855 N.E.2d 645, 650-51 (Ind. Ct. App. 2006); *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*; *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). Therefore, we operate under the earlier "presumptive" sentencing scheme when addressing Schott's convictions.

aggravating factor that was improper" and that it gave insufficient weight to the two identified mitigating circumstances.[4] Appellant's Br. p. 3.

In general, sentencing lies within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, "including a trial court's decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances." *Id*. Furthermore, "[w]hen enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances." *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005) (quoting *Bailey v. State*, 763 N.E.2d 998, 1004 (Ind. 2002)), *trans. denied*. A single aggravating circumstance is adequate to justify an enhanced sentence. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*.

Schott first argues that the trial court may have found an aggravator that is improper under the holding in *Blakely v. Washington*, 542 U.S. 296 (2004). Specifically, Schott directs us to a portion of the sentencing transcript wherein the prosecuting attorney stated, "There were a number of shots. Point of fact, the nine millimeter semiautomatic was emptied into the victim. This was done in front of a six[-]year[-]old child." Appellant's Br. p. 5 (citing Tr. p. 20). Schott then contends that the trial court may have been referring to the alleged presence of Schott's six-year-old niece at the crime scene,

[4] We note that Schott makes no argument that his 1996 sentence was manifestly unreasonable.

and he points out that defense counsel clarified the issue at the sentencing hearing, stating that the child was asleep in another room of the home when the shooting occurred. *See* Tr. p. 22. Moreover, Schott argues that he never admitted to the presence of the child, nor was it ever found by a jury beyond a reasonable doubt. Therefore, Schott contends that its use by the trial court violates *Blakely's* requirement that apart from prior convictions, any fact used to enhance a sentence must be admitted or consented to by the defendant or found by a jury. *See, e.g.*, *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005).

We recognize that the decisions of this Court have expressed differing opinions regarding the retroactive application of *Blakely* in the belated appeals context. *Compare, e.g.*, *Gutermuth v. State*, 848 N.E.2d 716 (Ind. Ct. App. 2006), *trans. granted*, *with Robbins v. State*, 839 N.E.2d 1196 (Ind. Ct. App. 2005). However, we need not reach this issue today because we find that the trial court never considered the alleged improper aggravator involving the presence of the six-year-old child at the shooting. The trial court's sentencing order states that it considered "the manner in which the weapon was used" as an aggravating circumstance. We cannot agree with Schott that this language could reasonably have referred to the presence of the child. Rather, we agree with the State's reading that the trial court, when citing the manner in which the weapon was used, was referring to the fact that Schott emptied the gun when he fired repeatedly into Peffley's body. Having determined that the trial court did not consider the presence of the child as an aggravator, we need not address the validity of that aggravator under *Blakely*.

Schott next argues that the trial court failed to accord sufficient weight to the mitigating circumstances it found, and therefore that the aggravators and the mitigators were not properly weighed against one another. "[A] trial court is not obligated to weigh or credit the mitigating factors in the manner a defendant suggests they should be weighed or credited." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). Here, Schott contends that the court should have assigned greater weight to his lack of any prior criminal history.[5]

The trial court's sentencing order indicates that it engaged in the process of weighing the aggravators against the mitigators. The court found that the aggravators—the fact that Schott returned to his step-father's home with a gun on the same day the two were involved in a violent altercation and the manner in which the weapon was used—outweighed the mitigators—Schott's age and his lack of any criminal history. The court then sentenced Schott to forty years for a class A felony. *See* Ind. Code § 35-50-2-4 (1996) ("A person who commits a Class A felony shall be imprisoned for a fixed term of

[5] Schott states in his brief that "this sentence could only be reached if the trial court gave insufficient weight to the mitigating factors (age of the Appellant and lack of any criminal record) and too much weight to the aggravating factors. . . ." Appellant's Br. p. 7. Apart from this, Schott does not make any argument as to why his age should warrant more mitigating weight or why the aggravators were afforded too much weight. To the extent that Schott sought to include these considerations on appeal, he has waived the issues. *See* Ind. Appellate Rule 46(A)(8)(a) (argument must contain the contentions of the appellant, supported by cogent reasoning and citation to authority). We therefore find Schott's argument on this point to be that the trial court failed to assign sufficient weight to his lack of any criminal record and therefore improperly weighed the aggravators and mitigators.

In addition, though not separately identified by Schott as an issue raised on appeal, a portion of his brief also alleges that the trial court failed to find his confession as a valid mitigator. Schott suggests that we find his cooperation with the police—that is, his willingness to lead them to the gun used in the shooting—to be a confession, although he did not directly confess to the killing until he entered his guilty plea. Schott is correct that a confession may constitute a valid mitigating circumstance. *See Frey v. State*, 841 N.E.2d 231 (Ind. Ct. App. 2006). However, even if we were to agree with Schott that his cooperation with police constituted a confession in this case, this would not change our decision on the present facts.

thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.").

In addition, at the sentencing hearing, the trial judge elaborated further on the weight of the aggravators and mitigators, stating, "I feel that the aggravating circumstances outweigh the mitigating circumstances; however, I don't think they outweigh them substantially. For that reason, I'm going to enhance the sentence by ten years." Tr. p. 23. While the trial court may not have balanced the aggravators and mitigators in the same manner the defendant considered appropriate, it did not abuse its discretion when it determined that the two aggravators outweighed the two mitigators sufficiently to justify an enhanced sentence still falling below the maximum sentence allowed for voluntary manslaughter. We therefore affirm the trial court's handling of the aggravators and mitigators in this case.

Affirmed.

BARNES, J., concurs.

BAILEY, J., concurs in result.